IN THE LABOUR COURT OF SOUTH AFRICA

(HELD IN CAPE TOWN)

CASE NUMBER:	C747/2012
DATE:	8 MAY 2014

In the matter between:

DEPARTMENT OF HEALTH	Applicant
and	
K FORTUIN	First Respondent
C S MBILENI N.O.	Second Respondent
PHSDSBC	Third Respondent
DENOSA	Fourth Respondent

J U D G M E N T

STEENKAMP, J:

What served before the Court today is –

- an application for condonation in respect of the late filing of an application for review by the applicant, the Department of Health, Western Cape;
- a counter-application from the first and fourth respondents, that is the employee, Nurse K Fortuin, and her trade union, DENOSA, to make the award under attack an order of Court; and

- an incidental application to join DENOSA as the fourth respondent.

Although I will revert to it at the end, I may as well note at the outset that the application to join DENOSA as the fourth respondent is granted. It is not opposed and it appears in any event that the Department of Health in its application for condonation accepted that DENOSA is a respondent in the matter.

The Court dealt earlier today, after the lunch adjournment, with two preliminary issues and made two preliminary rulings in respect of the conduct of the State Attorney in this matter. I gave *ex tempore* reasons for those orders at the time.

Unfortunately, the history of this matter, leading to the present application for condonation, has been exacerbated by the further conduct of the Department, of the State Attorney and its counsel, as evidenced by the history leading up to the application for condonation. I will deal with that application shortly at the hands of the well known principles set out in Melane v Santam Insurance Company Limited 1962 (4) SA 531 (A) and further authorities.

The application is almost two years out of time. Mr *Van der Schyff*, who appeared for the Department, conceded quite properly that it is an excessive delay. With regard to the reasons for delay, he also conceded that there is no proper explanation. That should have been the end of the matter. I will nevertheless deal with those issues briefly.

The parties received the award on 19 August 2010. The Department only filed the review application on 13 September 2012 and only filed its application for condonation more than a month later. The State Attorney was instructed as long ago as December 2010. There was then a period during which the parties discussed a possible "super arbitration". However, the case of this nurse, Ms Fortuin, was not part of that process. Nevertheless, even after those negotiations had concluded the State Attorney did nothing else for more than a year.

It is trite that an applicant for condonation is required to explain not only the chronology of events but also to account for each period of time that lapsed between those events. Insofar as any further authority is necessary, Ms *Harvey* referred in that regard for example to Imatu obo Zungu v South African Local Governing Bargaining Council (2010) 31 *ILJ* 1413 (LC) at paragraph 13.

In brief, there is no good reason for the 14 week delay between receiving the award and instructing the Department's legal services to review it. There is no good further reason for the two week delay before legal services sent the matter to the office of the State Attorney. There then follows the possible super arbitration that I had alluded to. There is then a 7 week delay before the State Attorney consulted with counsel. Firstly, the State Attorney does not explain why it was necessary to consult with counsel; but in any event is there is no proper explanation for that delay other than that the deponent to the founding affidavit, Mr Liebenberg, was involved in training in the Southern Cape. There is no explanation why he somehow was uncontactable in the far reaches of the Southern Cape.

Most alarmingly, Ms Melapi, who deposes to the application for condonation on behalf of the State Attorney, says that the matter "fell by the wayside" for a period of 9 months. That is a shocking concession to be made by an attorney. Unfortunately not only this Court, but the Constitutional Court has had occasion far too often to remark on the lax approach that the State Attorney, and specifically this office in Cape Town of the State Attorney, takes in dealing with matters.

In the recent case of Grootboom v National Prosecuting Authority [2014] 1 BLLR 1 (CC) Bosielo AJ dealt at some length with the conduct of this office of the State Attorney in the matter before the Constitutional Court. In the course of so doing he made some remarks that have gone unheeded. It has become necessary, it appears, for this Court to quote from that judgment at some length. At paragraph 21 the Constitutional Court says:

> "The failure by parties to comply with the rules of Court or directions is not of recent origin. Non-compliance has bedevilled our courts at various levels for a long time. Even this Court [i.e. the Constitutional Court] has not been spared the irritation and inconvenience flowing from a failure by parties to abide by the rules of this Court."

Bosielo AJ then goes on to say at paragraph 23:

> "It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or Court's

> directions. Of great significance, the explanation must be reasonable enough to excuse the default."

I pause there to note that the Constitutional Court refers not only to the rules, but also to the Court's directions, with which neither the State Attorney nor its counsel has complied in the case before me today. I return to the Grootboom judgment at paragraph 25 where the Court refers to the explanation proffered by the State Attorney in that case. Bosielo AJ notes that Ms Bailey in the State Attorney's office was aware of the date of set down, but that she had not even furnished counsel with a copy of the directions. It appears that the same happened in this case. The Constitutional Court then says at paragraph 27:

> "This points to some laxity in the office. However, as the official in charge of the office, she [that is Ms Luter] has offered her apologies to this Court for the inconvenience. This evinces her appreciation for her duty and responsibility to the Court, her clients and other parties to the litigation. This should be seen in the light of her responsibility to assist the Courts to maintain their 'independence, impartiality, dignity,

> accessibility and effectiveness'. One can only hope that she will inculcate the same sense of conscientiousness in her subordinates to avoid a recurrence of such an embarrassing situation."

Sadly it appears that that word of caution from the highest Court in the land, directed specifically to the office of the State Attorney in Cape Town, has gone unheeded. The Constitutional Court goes on to say at paragraph 29:

> "During the hearing counsel for the respondents could offer no acceptable explanation. Confronted with this quandary he had to concede that the lapses are inexcusable. Ordinarily this concession will have sounded the death knell of the respondents' case."

Again, this is depressingly similar to the case before me. Bosielo AJ goes on to say at paragraph 30:

> "There is another important dimension to be considered. The respondents are not ordinary litigants. They constitute an essential part of government. In fact, together with the office of the State Attorney, the respondents sit at the

heart of the administration of justice. As organs of State, the constitution obliges them to 'assist and protect the courts' to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts."

And I then quote further from paragraph 31:

"The primary duty of the office of the State Attorney is to serve the interests of the government by initiating proceedings on behalf of or defending any proceedings against the state. I need to remind practitioners and litigants that the rules and Court's directions serve a necessary purpose. Their primary aim is to ensure that the business of our courts is to run effectively and efficiently. Invariably this will lead to the orderly management of our courts' rolls which in turn will bring about the expeditious disposal of cases in the most cost effective manner. This is particularly important given the ever increasing costs of litigation which, if left unchecked, will make access to justice too expensive."

I need not go any further other than to point out that the state, including the office of the State Attorney, appears to be impervious to those ever increasing costs of litigation because those costs are invariably borne by the taxpayer when the State Attorney and its clients do not adhere to the rules and directions of this Court and other courts.

In the absence of a compelling explanation it is not necessary to consider the applicant's prospects of success on review. That much again has been held in a number of cases including Moila v Shai N.O. [2007] 5 BLLR 432 (LAC) and National Union of Mineworkers v Council for Mineral Technology [1993] 3 BLLR 209 (LAC).

I will nevertheless deal briefly with the prospects of success as well. In his submissions before the Court this morning, Mr *Van der Schyff* confined himself to one ground raised belatedly for the first time before Court today and not foreshadowed by the Department's initial review application. He did not persist with any of the grounds of review raised in the application for review. His only submission was that the award that his client seeks to review and set aside is in fact not an award at all.

As Ms *Harvey* pointed out, the absurdity of that argument is self-evident. It would mean that the Department seeks to

review something that is non-existent. Mr *Van der Schyff* goes further to say that the award is a "misnomer", whatever that may mean in law; that in law an award has not yet been handed down; and that the award is null and void. He appears to base that argument on an unreported *ex tempore* judgment by the Labour Appeal Court. He has not bothered to make that judgment available to the Court and it is quite obvious that the Court simply cannot consider such a judgment, if it exists. And in any event, an arbitration award – like any administrative decision -- is valid and enforceable until properly set aside by a Court.[1]

Insofar as the Department's argument today can be dealt with in terms of its initial grounds of review, the Court has to consider whether those grounds have any merit.

The award stems from a collective agreement known as an occupational specific dispensation or OSD that took effect on 1 July 2007. It relates to the so-called translation of nurses from the positions they held on 30 June 2007.

Its common cause that the OSD is a collective agreement and that it enjoys the special status afforded to collective

[1] *Oudkraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) para [26]; *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* [2014] ZACC 6 para [100].

agreements in terms of section 23 of the Labour Relations Act, as recently confirmed by the Constitutional Court in CUSA v Tao Ying Metal Industries [2009] 1 BLLR 1 (CC) at paragraphs 55 to 56.

Mr *Van der Schyff* appeared to argue that, despite the fact that the Department told the arbitrator that the facts before him were common cause and that there was no need to hear evidence, the arbitrator should nevertheless have insisted upon evidence by way of either oral evidence or affidavits. He says that it appears from the award that the facts were actually not common cause. However, on the evidence before this Court that largely encompasses the evidence that served before the arbitrator, it appears that the facts were in fact common cause, as set out in the trade union's submissions before the arbitrator and in the answering affidavit of Mr Bongane Lose.

Firstly, it needs to be noted that the Department has not placed its submissions that served before the arbitrator before the Court, despite having had more than two years to do so. From Mr Lose's affidavit one gleans the following: He says at paragraph 7:

> "Our member, Ms Fortuin, was the nursing manager in overall charge of the clinic at Wolseley. She did not share the post with anybody else. She did not rotate with another employee in this function. There was no rotation system in place affecting the Wolseley clinic."

He goes further to say in paragraph 27:

> "The Breede Valley sub-district followed a rotational policy and this appears to be the reason for the Department's decision to advertise the post of operational manager for all the clinics, despite the Wolseley Clinic not following a rotational system. The Court is referred to my written argument which was submitted to the arbitrator, reproduced as attached, marked BL1".

When the Court then turns to BL1 as Mr Lose enjoins it to do, it finds that Mr Lose says:

> "In explaining the reason why they did not translate it to the operational manager's post, they [that is the Department] said, 'in the case where more than one person acted as PHC Clinic

Manager on rotational basis before or on 30 June 2007, the post had to be advertised'".

Lose then goes on to say:

"As stated before and undisputed by the Department, she [Ms Fortuin] was the only PHC Clinic Manager for Wolseley Clinic."

And he adds that in many clinics neighbouring the Wolseley Clinic there was a rotation system, but not at the Wolseley Clinic itself. Those submissions are not replied to by the Department and in terms of the rules set out in Plascon Evans Paints v Van Riebeeck Paints it has to be accepted by the court. That was also the undisputed evidence before the arbitrator. In applying the OSD he properly and reasonably found that the Department wrongly translated Ms Fortuin to the lower post of clinical nurse practitioner instead of the post to which she ought to have been translated, that is the post of Operational Manager Nursing (Primary Health Care) at level PMB3 with a salary of R235 659,00 per annum.

The arbitrator's award clearly is a reasonable one. Even though Mr *Van der Schyff* did not persist with the other grounds of review raised in the initial application, I shall deal

with them very shortly. Firstly, the nurse did not waive her rights under the OSD and in any event, as Ms *Harvey* pointed out with reference to SA Co-op Citrus Exchange v Director General Trade and Industry 1997 (3) SA 236 (A), rights conferred in the public interest cannot be waived.

The arbitrator also did not exceed his powers by granting substantive relief. I have already referred to Tao Ying, stating that collective agreements are binding and enforceable; and the power and the duty to determine a dispute over the interpretation and application of a collective agreement is clearly bestowed upon the arbitrator by legislation in terms of section 24 of the LRA.

In short, the review grounds are without merit and the Department has no prospects of success. However, as I have said earlier, the delay in this application is so excessive and the explanation so poor, as Mr *Van der Schyff* himself conceded, that the Court need not even have considered the prospects of success. It stands to reason that the applicant should bear the costs of this application. My only concern is that, once again, it will be the taxpayer that bears those costs.

In conclusion, I make the following order, and for the sake of completeness I will repeat the orders I made earlier today:

(1) CONDONATION IS GRANTED FOR THE LATE FILING OF THE APPLICANT'S HEADS OF ARGUMENT.

(2) THE STATE ATTORNEY IS ORDERED TO PAY THE COSTS ATTENDANT UPON ITS FAILURE TO FILE A PRACTICE NOTE *DE BONIS PROPRIIS*.

(3) DENOSA IS JOINED AS THE FOURTH RESPONDENT.

(4) THE APPLICATION FOR CONDONATION, AND THUS THE APPLICATION FOR REVIEW, IS DISMISSED WITH COSTS.

(5) THE ARBITRATION AWARD UNDER CASE NUMBER: PSHS577-09/2010 IS MADE AN ORDER OF COURT.

(6) THE FIRST AND FOURTH RESPONDENTS ARE GIVEN LEAVE TO ENFORCE THE AWARD AS AN ORDER OF COURT IF THE APPLICANT HAS NOT COMPLIED WITH IT WITHIN NINETY DAYS.

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STEENKAMP, J

For the applicant: Jerome van der Schyff

Instructed by: The State Attorney, Cape Town.

For first and fourth respondents: Suzanna Harvey

Instructed by: Chennels Albertyn, Rondebosch.